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CURRENT TOPICS

The Budget

THOSE who were encouraged by the newspapers and weekly reviews to expect something sensational in Mr. MACMILLAN'S Budget last Tuesday were disappointed. Let us not mourn. Two changes for which our profession has been pressing are to be brought about. The stamp duties on conveyances of cheaper houses are to be reduced and at last some relief for the retirement savings of the self-employed is in sight. Nothing could be of greater importance to the profession than the proposal to allow tax relief on premiums up to £500 for retirement annuities, and to exempt from tax the investment income of life assurance companies devoted to providing such annuities. Its achievement crowns seven years of brilliant and persistent work by the Council of The Law Society and particularly Sir EDWIN HERBERT, who, together with the Institute of Chartered Accountants, and later the Bar Council and a number of other professional bodies, have been tireless in seeking this reform. Sir Edwin, as its chief architect, has deserved well of his brethren. As to the most striking of the remaining Budget proposals, it is difficult to say whether the idea of introducing an element of chance into investment in Government stocks is good or not. The Chancellor may argue that, since those who invest their money in certain Government stocks at the present time must be gamblers, it is time that the thing was put on a proper footing. We shall deal with the various proposals affecting the profession as more details become available.

Reduced Stamp Duties

HAVING welcomed the proposal to reduce the stamp duties on conveyances, it may seem churlish if we now make two criticisms on detail. The first is that these reductions will not come into operation until 1st August next. This means that intending purchasers of houses will be tempted to defer completion until the reduced duties are in operation, with consequent confusion in solicitors' offices. We understand that the reason for the delay is that the Provisional Collection of Taxes Act, 1913, does not apply to stamp duties and so changes cannot be effected by resolution but only by a duly passed Finance Act, but we wonder whether the ingenuity of the Treasury could not be exercised in order to find a way round the difficulty. The prospect of a huge accumulation of completions at the beginning of the summer holidays is not attractive. Our second comment is that the Chancellor should consider a different approach to the gradation of the duties. We think that it might be better if the first £3,500, whatever the amount of the consideration, should be charged at the lower rate and that only the excess over £3,500 or £4,250, as

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the case may be, should bear the increased rate. As the proposal stands at present, the duty on £3,500 will be £17 10s., but on £3,600 will jump to £36. On £4,250 it will be £42 10s., but on £4,300 it will be £64 10s. We cannot see that any administrative difficulties would arise by having a gentler gradient.

Non-Contentious Probate Costs

SOLICITORS are making substantial progress towards the goal of being able to charge for their services in a sensible way. The Rules of the Supreme Court (Non-Contentious Probate Costs) (S.I. 1956 No. 552 (L.8)) come into operation on 1st May next. They enable solicitors to charge and be paid for all non-contentious or common form probate business for which instructions are accepted on or after 1st May next such sum as may be fair and reasonable having regard to all the circumstances of the case, and in particular to the factors which are already applicable to Sched. II charges. The same safeguard is provided as before for applying to The Law Society for a certificate. In practice, a large number of solicitors have been charging on this basis for some time past, but have been ultra-cautious in fixing their charges for fear of being called upon to account for every shilling.

Trustee Investments

FOR many years it has been clear that the list of authorised investments for trust funds set out in s. 1 of the Trustee Act, 1925, is no longer appropriate. Not only are few of these investments profitable, but some of them cannot be described as safe, except by attaching a very wide meaning to that word. Last July the Government announced that legislation to amend the list was contemplated, so that we should not be discouraged by the fact that last week the FINANCIAL SECRETARY talked out Sir ERIC ERRINGTON'S Bill to enable trustees to invest in equities and in building society deposits. We are not surprised that the Government are taking their time in considering the matter. The real difficulty is to devise a satisfactory statutory definition of a blue chip.

The Case for Administrative Tribunals

THE Treasury Solicitor, Sir HAROLD KENT, definitely favoured the *status quo* in his memorandum to the Committee on Administrative Tribunals and Inquiries, on which he answered questions put by the Committee on 9th April. The case for administrative tribunals was that their accessibility, cheapness and informality were essential for ordinary people to get justice under wide State schemes. The case against them, he believed, seemed unreal. Their informality and the expert knowledge of their members were appropriate in technical fields, especially valuation. As to whether the oath should be administered and whether it helped in ascertaining the truth, he said: "I do not think it does. Some people feel that when they are on oath they must be very careful what they say, that they must not put a foot wrong, and that makes them rather less candid." On tribunal procedure affecting land, he was against publication of the Minister's report, and considered that the published reasons for his decision should disclose his findings on any relevant matters of fact disputed at the inquiry. If the process of requiring publication of reports was carried too far, Sir Harold said, one broke down the machinery of Ministerial responsibility to Parliament. If a Minister was to be challenged in Parliament not merely on his final decision but on all the earlier processes which had gone toward forming it, there was a real danger of such a breakdown. He thought that the inspector would report a little differently if he thought the answer would be shown to the parties. "He might not push his view as far because he would know it might be found to be contrary to the ultimate decision, and might be found embarrassing."

Speed Limits

THERE are two points of view about the speed of traffic on the roads, one being that accidents increase with increased speed, and the other that they increase with increased slowness. Excessive speed, however, is frequently held by the court to be negligence, while excessive slowness, unless it is slowness to react to an emergency, rarely is alleged as negligence. Most of us will, therefore, agree, at any rate as lawyers, that the London and Home Counties Traffic Advisory Committee's Report, published on 13th April, is right in recommending that the general speed limit of 30 m.p.h. in built-up areas in the London traffic area should be continued, with no relaxation in the early hours of the morning. They also recommend that the time has not yet come to apply a general maximum speed limit to all roads, but the Minister and car manufacturers should agree on a voluntary limit to the speed potential of new high-powered cars; and that steps should be taken to prevent roads specially built to carry heavy through traffic from becoming built up. The Committee favour a higher speed limit on roads on which the present 30 m.p.h. limit is unreasonable, but four members who do not agree suggest an experimental limit of 45 m.p.h. on a few sections of road to enable a more factual assessment to be made. Although motoring organisations think that motorists may be confused by two separate speed limits, we venture to express the hope that it would take more than two limits to confuse the average motorist's intelligence. We must face the fact that on our narrow winding roads we cannot do without speed limits.

Drunk in Charge, E Minor Division

IT is difficult not to feel sympathy with the young man who wrote to Sheffield Magistrates' Court, in explanation of his driving at between 45 and 52 m.p.h. on his way home from a concert, that he was "spiritually intoxicated by the magic of Tchaikovsky's Fifth Symphony." The story ended with the customary brief highway coda—fined £2 10s.—but what is more disturbing is the added resolution in his letter: "I am cutting down my concert-going in future." We record elsewhere in this issue next week's motion for debate by the United Law Debating Society, "That modern society is destroying the arts which should be encouraged," and we would commend to the attention of the proposer this timely example in support of his argument. Readers of THURBER will remember that Walter Mitty, when his secret life at the wheel involved his piloting an eight-engined hydroplane through the worst storm in twenty years of Navy flying, also tended to speed up out of a sort of spiritual intoxication, and it may be that car drivers will soon have to cut down on their secret lives as well as on the arts. But where is all this leading? Spiritual intoxication is something that most people embroiled in modern society can hardly have enough of, and if drivers must reduce themselves to automata while at the wheel (as perhaps they ought), it seems a high price to pay for fitting themselves to sit in a car in a queue instead of standing at a bus-stop in one.

Company Law and Practice

THE COMPANY IN FINANCIAL DIFFICULTIES

A PREVIOUS article (*ante*, p. 272) considered some of the legal and practical problems that might arise and confront the advisers of a creditor of a limited company which runs into financial difficulties which the directors hope are temporary, but which may be permanent. In this article it is proposed to approach the problem from the opposite direction, and to consider some of the difficulties that would face the advisers of such a company.

In the previous article the need was stressed for the advisers of the creditor to obtain some reliable idea of the true financial position of the company. Even more so is it imperative for the advisers of the company to impress on its officers the need to obtain proper, and independent, professional advice, if necessary from accountants or from one of the many excellent firms of management consultants whose services are available. It will be assumed that some such action is being taken and that, in the meantime, the legal advisers of the company are asked to deal with the position *vis-à-vis* the creditors.

When advising a creditor the alternatives are fairly clear cut: to compromise or not to compromise. Further, the initiative is largely in the hands of the creditor. The company's advisers are in a very different position. The company cannot pay its debts as they become due and is, therefore, *prima facie*, insolvent. They have little with which to bargain, apart from the argument that drastic action can only bring about a liquidation from which nothing will emerge for the unsecured creditors. But it is dangerous to push this argument too far, for, if matters have really reached this stage, some responsibility may well rest upon the officers of the company for not having recommended a liquidation long ago.

The present problem is therefore much more of a commercial and financial one than a legal one, but in order that the financial considerations may be properly weighed it is essential to do so against the legal background; it is this legal background that the present article will make some attempt to supply.

The first question to consider is whether, and in what circumstances, the company should continue to trade.

Fraudulent trading

By s. 332 (1) of the Companies Act, 1948, if in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company . . . or for any fraudulent purpose, the court, on the application of the official receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper to do so, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct. By subs. (3) every person who was knowingly a party to the carrying on of the fraudulent trading is liable to imprisonment for up to two years or to a fine of £500, or to both imprisonment and fine.

It must be obvious that every company that is temporarily running at a loss is not carrying on business with intent to defraud creditors: if such were the case half the businesses in the country ought to close down forthwith. In this section the word "fraud" has an entirely different meaning from its use in the expression "fraudulent preference," where there may be no moral turpitude at all. Here it is necessary for there to be "actual dishonesty involving, according to current notions of fair trading amongst commercial men, real moral blame" (*per* Maugham, J., in *Re Patrick & Lyon, Ltd.* [1933] Ch. 786, at p. 790).

The cases on the section are few, being confined to three in number, namely, *Re William C. Leitch Bros., Ltd.* [1932] 2 Ch. 71; *Re Patrick & Lyon, supra*, and *Re William C. Leitch Bros., Ltd. (No. 2)* [1933] Ch. 261. In *Re William C. Leitch Bros., Ltd.*, the respondent had sold his business to the company in exchange for shares and a debenture. He became managing director. The company traded at a loss, but the respondent continued to order goods which became subject to his debenture. In making an order against the respondent Maugham, J., said (at p. 77): "If a company continues to carry on business, and to incur debts, at a time when there is to the knowledge of the director no reasonable prospect of the creditor ever receiving payment of those debts, it is in general a proper inference that the company is carrying on business with intent to defraud."

Whilst on the subject of offences and penalties, and before examining more practical considerations, reference will be made briefly to a number of other offences which may be committed by persons concerned in the management of companies in the period immediately preceding a winding up. This is obviously the period that must be considered, because if the attempts to stave off the creditors prove unavailing, a winding up must inevitably follow.

Offences and kindred provisions

The principal matters are to be found in Pt. V of the Companies Act, 1948, under the heading "Offences Antecedent to or in Course of Winding Up." For full details reference must be made to the Act but the following brief summary, with a few notes of recent cases, will give some idea of the type of transaction against which this part of the Act is aimed.

Section 328 is a catalogue of offences that may be committed by officers of companies in liquidation, or which are subsequently wound up, voluntarily or compulsorily. Section 329 prescribes penalties for falsification of books. Section 330 deals with frauds by officers of companies which have gone into liquidation, where the officers have fraudulently either induced any person to give credit to the company, or been party to any gift or transfer of the company's property, or have removed or concealed any part of the company's property. (In *R.* v. *Davies* [1955] 1 Q.B. 71 it was held that where a director had caused a company to cancel a debt due by him to the company, that was not a transfer within s. 330.)

A company is bound to keep proper books of account. Section 331 provides that if in a winding up it is found that proper books of account have not been kept within the two years immediately preceding, the directors are liable to imprisonment unless they can show that they acted honestly, and that in the circumstances of the business their conduct was excusable. In this section the expression "proper

books of account" is rather wider than in s. 147, which deals with the day-to-day running of the company—here the expression includes, for example, annual stocktakings.

Section 332 (fraudulent trading) has been considered. Section 333 is the important misfeasance section. If in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on . . . application . . . examine into the conduct of the promoter, director, manager, liquidator or officer and compel him to repay or restore the money or property . . . or to contribute to the assets of the company by way of compensation.

Section 333 only applies when there has been something in the nature of a breach of trust or duty whereby loss has resulted to the company. Its object is to secure repayment to the company of sums misapplied, not to punish the offender. The term "officer" includes an auditor or a secretary; it does not include a banker or a solicitor who confines his activities to the exercise of his professional functions. In the recent case of *Re B. Johnson & Co. (Builders), Ltd.* [1955] 3 W.L.R. 269; 99 Sol. J. 490, it was held that a receiver and manager appointed by a debenture-holder was not within the section. In this case, Sir Raymond Evershed, M.R., after considering the authorities, reached the conclusion (at p. 279) that "a simple case of negligence at common law would not be within the section" and, further, that "where a breach of duty had been committed, which did in fact result in a misapplication of the company's property, then such a transaction would be within the ambit of the section."

The last of this group of sections, s. 334, provides for the prosecution of delinquent officers and members of a company.

There are two other sections of the Act of immediate importance in the present context. By s. 188, where (*a*) a person is convicted on indictment of any offence in connection with the promotion, formation or management of a company; or (*b*) in the course of winding up a company it appears that a person (i) has been guilty of . . . (fraudulent trading) . . .; or (ii) has otherwise been guilty, while an officer of the company, of any fraud in relation to the company or of any breach of his duty to the company; the court may make an order that such person shall not, without the leave of the court, be a director of or in any way, whether directly or indirectly, be concerned or take part in the management of a company for such period not exceeding five years as may be specified in the order.

Secondly, there are provisions in the Companies Act, 1948, for the public examination of directors, officers and others. In a compulsory winding up, by s. 270 (1), where the official receiver has made a further report stating that in his opinion a fraud has been committed by any person in the promotion or formation of a company or by any officer of the company in relation to the company since its formation, the court may, after consideration of the report, direct that the person or officer shall attend before the court and be publicly examined as to the promotion or formation or the conduct of the business of the company or as to his conduct and dealings as officer thereof. By s. 270 (7), notes of the examination shall be taken down in writing, read over, and signed by the person examined. They may thereafter be used in evidence against him, and shall be open to the inspection of any creditor or contributory at all reasonable times.

A similar result may be obtained in a voluntary winding up, but in this case there is no need for a "further report" under s. 236 (2) (*Re Campbell Coverings, Ltd.* [1953] 1 Ch. 488). In such a case an application can be made by the liquidator under s. 307 (1), and the fact that in a voluntary winding up there can be no "further report" within s. 236 (2) and s. 270 (1) does not prevent the court from making the order, if it should decide to do so, provided the report on which the application is based has been considered by the judge personally (*Re Campbell Coverings, Ltd.* (*No. 2*) [1954] 1 Ch. 225).

Judgment creditors

Having briefly reviewed some of the penalties to which the officers of the not-so-honest company in financial difficulties may be liable, some practical aspects of the situation will be considered from the point of view of the company which has genuinely experienced a difficult patch from which there is reasonable hope that it may recover. If the officers of every company that was temporarily running at a loss were liable to the penalties prescribed by the Companies Act, 1948, the whole principle of corporate trading with limited liability would be destroyed. The point is, however, whose money is the company losing?

It is as well to remember that although the practices are prohibited, and the penalties are there, they are only, in general, meant to apply where some degree of fraud or turpitude is involved. There are plenty of cases where the shortage of liquid cash may genuinely be a passing phase and where there is every reasonable hope that conditions will soon improve. It is a question of degree as to when the situation has deteriorated to such an extent that no officer of the company could reasonably foresee any solution to its difficulties. Although, for this article, it has been assumed that this point has not been reached, nevertheless matters must not be allowed to go too far.

The obvious method of dealing with a judgment creditor is, of course, to pay him off. Indeed, he may have intimated that nothing less than payment in full will prevent him from levying execution or presenting a winding-up petition. Payment may be the obvious answer, but it may not for the moment be a possible one. In such a case the approach to the problem must depend as much on personalities and, indeed, on negotiating ability as on anything. On the other hand, if payment is possible, the degree of pressure exercised by the creditor may be important, as in certain circumstances the payment might amount to a fraudulent preference. Some comments on this aspect of the matter were made in the previous article.

Although a creditor may be told that to some extent his interests are identical with those of the company, pleas for time to pay, backed by little else, are apt to carry little weight. Something more concrete must be forthcoming.

It is possible, but unlikely, that there may be some uncalled capital. It may be possible to raise money, if there are any assets left to charge, by means of a floating charge, which would be protected under s. 322 as having been created in consideration of cash paid at the time of, or subsequently to, the creation of the charge. A loan or guarantee may be forthcoming from a director, officer or member, and whether this is forthcoming or not is a very important factor to take into consideration in deciding whether to advise that the company should continue or should wind up. It is difficult to find any convincing explanation why, if those most directly concerned are unwilling or unable to find the cash to enable the company to keep going, a creditor should be expected to

allow the company unlimited time to pay, on the basis that if the company fails he will probably get nothing, whereas should it succeed he will get payment of his debt and nothing else. Creditors are also very sensitive to directors' fees: it is useless to ask for a moratorium when there is an item in the profit and loss account of several thousand pounds a year for directors' fees, and few can blame the creditors for their point of view.

The company may be able to negotiate terms with a particular creditor, but it must be realistic in its approach to him. The least that is likely to be accepted is payment by instalments, together with interest on the outstanding balance.

Scheme of arrangement

If there is more than one judgment creditor, or, preferably, before there is any sign of unrest among the creditors as a body, it may be necessary to take the bull by the horns and to put forward some proposals for coming to an arrangement with creditors.

Section 206 of the Companies Act, 1948, provides a method by which a company may make a compromise or arrangement with its creditors, or with any class of them. It involves holding meetings as directed by the court, and if at such meetings a resolution is passed by a prescribed majority, and is then sanctioned by the court, the arrangement is binding on all concerned. By s. 207, with the notices convening the creditors' meeting there must be sent a statement explaining the effect of the compromise or arrangement and in particular stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the compromise or arrangement, so far as it is different from the effect on the like interests of other persons. For a scheme of arrangement to be binding under s. 206 it is necessary for a majority in number to agree to it, and such majority in number must represent three-fourths in value of the creditors or class of creditors.

Any scheme which is fair, reasonable and made in good faith will be sanctioned if it could reasonably be supposed by sensible business people to be for the benefit of the company and creditors concerned (*Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.* (1891), 7 T.L.R. 171). For example, schemes have been approved whereby debenture-holders accept shares in discharge of their debts, or existing debenture-holders accept postponement to fresh debentures, or unsecured creditors accept a composition of so much in the £ payable partly in cash and partly in shares or, perhaps, partly in debentures.

Reconstruction

Sometimes the position may be remedied by a reconstruction under s. 287, whereby the whole property and undertaking of the company is transferred to a new company formed for the purpose. The shares in the new company, which will normally have an unpaid liability, are distributed to the members of the old company in place of their shares in the old company. This method enables the business to be re-established with a fresh capital structure. It is frequently used by a company which requires fresh capital but, owing to its financial position, cannot raise it on the market, although the existing members may be willing to put in new capital. The new capital is obtained by calling up the amount unpaid on the partly paid shares in the new company distributed to the members in exchange for their holdings in the old company.

To effect such a reconstruction the company has to be put into voluntary liquidation (*ex hypothesi*, in the present case, a creditors' voluntary winding up) and the liquidator has to be authorised by special resolution to sell the whole, or part, of the undertaking for shares or like interest in the new company to be distributed among the members. The consent of the court or of the committee of inspection must be obtained.

Creditors are asked to accept the new company by novation. They may, however, within one year present a petition for compulsory winding up. If a petition is presented the sale becomes invalid unless sanctioned by the court. If no winding up order is made within a year the sale is binding on creditors.

Conclusion

In this article some examination has been attempted of the position which may confront the legal adviser of a company in financial low water. The most important question is, however, not a legal one. Why has this situation arisen at all? This is a matter for accountants and other financial experts rather than for the solicitor. It may be due to mismanagement, to under-capitalisation, to inefficient costing, or to a thousand and one other causes. It is hoped that nothing in this article will be construed as a suggestion that a solicitor could properly advise his client to "take a chance." If a company cannot pay its debts as they become due then, unless there is some really substantial reason to the contrary, it ought to wind up. If it does wind up and is hopelessly insolvent then the officers may have to explain themselves, for whether or not they genuinely believed that the company would eventually extricate itself from its difficulties is a question of fact. The fact that they took expert advice may have some bearing on the question.

H. N. B.

SOCIETIES

The seventy-first annual general meeting of the CHESTER AND NORTH WALES INCORPORATED LAW SOCIETY was held at The Castle, Chester, on 28th March. The following officers were appointed for the ensuing year: president, Mr. J. Kerfoot Roberts, of Holywell; vice-president, Mr. Thomas J. Alcock, of Sandbach; hon. treasurer, Mr. H. L. Birch, of Chester; hon. secretary, Mr. J. C. Blake, of Chester. The following were elected to serve on the committee: Mr. H. O. Jones, of Chester; Mr. A. R. Whittingham, of Nantwich; Mr. John R. Williams, of Abergele; Mr. E. A. Harris, of Shotton. Fifty-one members were present at the meeting.

The meeting was followed by the annual dinner, held at the Blossoms Hotel, Chester, which was attended by seventy-two members and guests, including His Honour Judge Rowe Harding, Mr. J. Fenlli Roberts (Chief Constable of Flintshire) and Mr. A. W. McCay (representing the Chester and North Wales Medical Society).

THE UNITED LAW DEBATING SOCIETY announces the following debates for April, 1956: 23rd April, at 7.15 p.m., in Gray's Inn Common Room, "That modern society is destroying the arts which should be encouraged"; 30th April, at 7.15 p.m., in Gray's Inn Common Room, "That *Romford Ice & Cold Storage Co., Ltd.* v. *Lister* [1955] 3 All E.R. 460 was wrongly decided."

A Conveyancer's Diary

RESIDUARY GIFTS AND THE DOCTRINE OF CY-PRÈS

THE climate of judicial opinion sometimes changes from one generation to another. I have the impression that twenty years ago it was much more difficult to establish a gift as a good charitable gift than it is to-day, when the leaning is all toward the charity. One instance is to be found in the cases (there were three or four of them in a run, about as many years ago) in which it was held that the relief of old age *per se* and however the gift was wrapped up was a valid charitable purpose; I do not say that the result of these cases was necessarily wrong in view of the history of this subject, but the approach of the learned judges who decided them was, I think, very different from what it would have been if the cases had been tried before the war. Another instance of what may, without any overtones of adverse criticism, be called judicial laxity in this sphere can be found in the decision of Vaisey, J., in *Re Raine* [1956] 2 W.L.R. 449, and p. 111, *ante*.

A testatrix gave her residuary estate "for the continuation of the seating" in a particular church. This is a good charitable purpose, but the residue amounted to some £2,500, and only some £400 was required to complete the re-seating of the church. Was the surplus to go to the next of kin as undisposed of, or was it applicable *cy-près*?

The underlying principles

It is as well in approaching this kind of problem to start off with some classic exposition of the underlying principles. In *Re Wilson* [1913] 1 Ch. 314, at p. 320, Parker, J., as he then was (a judge of unrivalled experience and knowledge in charity matters), said this: "For the purposes of this case I think the authorities must be divided into two classes. First of all, we have a class of cases where, in form, the gift is given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention according to the true construction of the will is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the donor as to the manner in which the general gift is to be carried into effect. In that case, though it is impossible to carry out the precise directions, on ordinary principles the gift for the general charitable purpose will remain and be perfectly good, and the court by virtue of its administrative jurisdiction can direct a scheme as to how it is to be carried out. . . . There is then the second class of cases where, on the true construction of the will, no such paramount intention can be inferred, and where the gift is held to fail." That is the general principle, and it is interesting to note from Lord Parker's reference to "ordinary principles" that it is not something peculiar to charity cases. Another well-known instance of the application of those "ordinary principles" is in what has come to be known as the rule in *Hancock* v. *Watson* [1902] A.C. 14.

Charitable gift itself residuary

In *Re Raine*, Vaisey, J., accepted the proposition that unless one can find a general charitable intention the *cy-près* doctrine cannot or ought not to be applied as a general proposition, and he referred to, *inter alia*, *Re Stanford* [1924] 1 Ch. 73 for that. In that case, a pecuniary gift to a university for the publication of the testator's dictionary was held to be a gift for a particular purpose lacking any indication of a general charitable intent; the surplus, after meeting the costs of publication, was held to be undisposed of and go to the next of kin. But different considerations, Vaisey, J., thought, arise where the charitable gift is (as it was in the case in question) itself a residuary gift. "It is quite obvious," the learned judge said, "that the testatrix wanted everything she had to be devoted to Romaldkirk Church . . . and I think that from that one fact one finds an intention to part with, so to speak, the whole of her property in favour of a charity, and from that one spells out a charitable intention which can only be carried out by the application of the *cy-près* doctrine." And later in his judgment, Vaisey J., said that the testatrix had shown on the face of her will an intention to give the whole of the residue of her estate for charitable purposes: "She did not intend to keep anything back. She gave no further directions. True it is she did not leave anything to the vicar and churchwardens or the Parochial Church Council or to any other person, but merely indicated the purpose for which this money was to be applied."

In between these two passages there is a reference to two decided cases, *Re King* [1923] 1 Ch. 243 and *Re Royce* [1940] Ch. 514. In the first of these there was a bequest of residue to provide for the erection in a parish church of a memorial stained glass window. It was argued first that this was not a good charitable purpose at all, and secondly that, if it was, the surplus after providing for the erection of the window was not applicable *cy-près*. Sir Mark Romer, J., rejected both these contentions. With the first of these questions we are not here concerned. As to the second, in *Re Raine*, Vaisey, J., said that, if the decision in *Re King* was right, it was indistinguishable from the case before him. Now on that point the decision in *Re King* is, as a decision, quite clear; but it is not easy to see how it was reached. Romer, J., referred to the case of a legacy to a charitable institution which exists at the date of the testator's death but ceases to exist before the legacy can be paid, where, he said, the legacy is applicable *cy-près* "even in the absence of a general charitable intention: see *Re Slevin* [1891] 2 Ch. 236." This decided the point. But *Re Slevin* was not a case of *cy-près* application; it was a case of application under the sign manual (see *Re Kellner's Will Trusts* [1949] Ch. 509), and for that reason seems to be a very uncertain guide to the different kind of case which arose in *Re King*. That decision is distinguished in Tudor on Charities (5th ed., p. 159) from the ordinary case typified by *Re Stanford*, *supra*, on the ground that the gift in it was a gift of residue, and from that circumstance alone it was clear that the subject-matter of it had been devoted by the testatrix to charity. That is really the *ratio decidendi* of *Re King*; whether it is a satisfactory one or not, is another matter.

The other case, *Re Royce*, from which Vaisey, J., said that he also derived some assistance, was to my mind a somewhat special case. The gift was of a residue amounting to a considerable sum to the vicar and churchwardens of a parish church (note that here there was a gift to, in effect, a corporation, such as was absent in *Re Raine*) "for the benefit of the choir." Simonds, J., expressed the view that a gift simply

for musical services in a parish church would not be charitable. (That was in 1940; probably this view would have prevailed also to-day, despite *Re Levien* [1955] 1 W.L.R. 964.) But on construction, Simonds, J., held that the gift was not merely for musical services; it was a gift for the advancement of religion by means of musical services. On that footing there was a general charitable intent to which effect could be given if the fund were more than sufficient for carrying out that general charitable intention by the particular mode specified by the testator, and a scheme was directed for the application of the surplus *cy-près*. (In his judgment, Simonds, J., expressed his opinion that the distinction between a general and a particular charitable intention is a very artificial one. That is doubtless so. If Lord Eldon had not been deterred by the state of the authorities from so holding, the whole doctrine of application of funds for the benefit of charity *cy-près* might well have been strangled shortly after its birth: see *A.-G.* v. *Mayor of Bristol* (1820), 2 J. & W. 294, at p. 307. It is an artificial distinction because the doctrine is an illogical one.)

Vaisey, J., said that he read *Re Royce* as indicating that, where a testator has shown an intention to use the whole of a residue, or the remaining portion of a residue, for a charitable purpose, it is not necessary to do more than to find that intention, namely, an intention to part with the whole subject-matter of the residuary gift for a charitable purpose. With respect, this seems to be reading too much into a decision which was really almost wholly a decision on construction. The fact that the gift was one of residue did certainly weigh to some extent with Simonds, J., but the crux of the case, to my mind, is the finding of a general charitable purpose (the advancement of religion) behind or underneath the particular mode (the provision of musical services). This could have been an approach to the problem of the testatrix's intention in *Re Raine* also, but it was not the one chosen by the learned judge. (Incidentally, Vaisey, K.C., as he then was, argued for the vicar and churchwardens in *Re Royce*, among other things, that the will disclosed a general charitable intent.)

Breaking new ground

The case of *Re Raine* is a clear decision to the effect that, when a gift is made for a particular charitable purpose and there is a surplus after that purpose has been satisfied, the destination of the surplus will or may depend on whether the gift is one of residue or of a legacy. That is, I think, a step beyond anything which had been in terms decided before this case, and the question is whether it may not be a step too far. The cases which I have examined were all cases of a surplus after satisfaction of a particular purpose. But that is one instance only of the circumstances in which the *cy-près* doctrine has been applied. An equally common instance is the total failure of the particular mode or object (e.g., a gift to a non-existent institution). It follows from *Re Raine* that in such a case it will be easier to extract a general charitable intention from the will if the gift is one of residue. But in the past these cases have never, so far as I know, been affected by this. If the present decision is to be applied logically, its effect will be wider than the circumstances of the case which gave rise to it at first indicate. This is not, of course, by itself any indication that the decision is either logically unsound or not justified by the authorities. But coupled with the doubts which (as I think) may legitimately be felt about the inferences which the learned judge drew from the earlier cases to which he referred, it should signal caution in applying the principle of the decision to any other case not on all fours with the particular facts which came before the court in *Re Raine*.

"A B C"

Landlord and Tenant Notebook

CRIMINAL OFFENCES

It is not often that the Central Criminal Court and the Court of Criminal Appeal provide material for this Notebook; but the recent decisions in *R.* v. *Silver and Others* [1956] 1 W.L.R. 281; *ante*, p. 228 (C.C.C.) and *R.* v. *Breed* [1956] Crim.L.R. 199 (Cr.A.) are of some interest to landlords and tenants. In the one, a prosecution under the Vagrancy Act, 1898, failed; in the other, an appeal against a conviction for larceny was dismissed. The vital point in the one was whether a landlord who lets to a prostitute, knowing that she intends using the premises for the purposes of prostitution, lives on her immoral earnings; in the other, whether a defence of claim of right had been fairly put to a jury concerned with an indictment for "stealing fixtures."

Rent: whose earnings?

In *R.* v. *Silver and Others*, *supra*, eight out of nine defendants were charged in a five-count indictment with knowingly living wholly or in part on the earnings of prostitution, contrary to the Vagrancy Act, 1898, s. 1 (1). The subsection applies only to male persons and the other defendant, a female, was charged with aiding and abetting.

Evidence was called to show that the accused had all been concerned in the letting of flats to prostitutes—one flat, one prostitute—and that the rents reserved were higher than what would be yielded by letting to respectable tenants. The case for the prosecution having been closed, submissions were made (two counsel appeared for one of the defendants, one for two others, one each for five of them; the other defendant was not represented) and His Honour Judge Maude ruled that there was no evidence which would justify the jury in convicting them (the defendants).

The learned judge went into the law at some length. The terse expression, "one flat, one prostitute," used above was in fact borrowed from the judgment; emphasis was being laid on the distinction between "what are called brothels," which the common law had known how to deal with for centuries, and premises where only one woman was operating (a distinction recently illustrated by *Strath* v. *Foxon* [1956] 1 Q.B. 67; see 99 Sol. J. 920). Statute law had then dealt with brothels; the Criminal Law Amendment Act, 1885, s. 13, had not added much to the common law, but an amendment made by the Criminal Law Amendment Act, 1912, s. 4 (2), had extended the scope to any person being "the tenant, lessee, or occupier, or so far as this section relates to brothels, the person in charge of any premises, knowingly permits such premises or any part thereof to be used as a

brothel or for the purposes of habitual prostitution." This, of course, did away with the distinction up to a point; but as was decided by *Siviour* v. *Napolitano* [1931] 1 K.B. 636, "lessee" in that subsection means "lessee in occupation." (There was, of course, no occasion to mention that the learned judge had acted for the accused—the respondent—in that case; or that his then opponent had quoted the third edition of the learned magistrate's own work at him—ignoring, as Avory, J., was to point out, observations made in the fourth edition.)

The question was, therefore, what was meant by living on the earnings of prostitution? It might seem, the learned judge observed, to those who did not give careful consideration to the question, that anybody who received money earned by a prostitute would be committing an offence. But it was common ground that a doctor who treated, or a shopkeeper who supplied, a prostitute knowing that she was a prostitute gave services or goods in exchange for money; what was handed over might be her earnings, but became theirs.

This left the point whether a wholly different situation arose if a landlord let his premises for the purposes of prostitution and got a "prostitute rent," then, since the ordinary moral rent was less than the prostitute rent, to the extent of the excess he was living on the earnings of prostitution. There may be something to be said for the proposition; but the learned judge decided against it; a shopkeeper who grossly overcharged a prostitute would, nevertheless, be living on his own earnings—utterly, completely and disgustingly immoral, but his earnings; what the landlord was doing was living on his own earnings, just like the shopkeeper.

Some criticism of this ruling might be based on the suggestion that a shopkeeper can hardly be in a position to charge an excessive price because his customer is a prostitute; it is essentially the law of demand and supply that operates to the landlord's advantage, also, since rent is essentially a "retribution or compensation *for the lands demised*," "a certain *profit issuing out of* lands and tenements corporeal," an attempt might have been made to show that the analogy was a false one. Rent—*redditus*—is reserved; could it not be said that the landlord shares the tenant's profits or earnings? However, the point was not taken; His Honour reminded the jury that the court was not a court of morals, the matter one for Parliament, if it thought fit. Perhaps the one beneficial result may be that those landlords who share the unhappy feelings of the writer of "Woes of a Landlord," in *The Times* of 7th February last (and whose woes, incidentally, would have been fewer and less if he had occasionally employed a lawyer), may derive some comfort from the thought that they "earn" the rent.

Honest belief in right to fixtures

The appellant in *R.* v. *Breed, supra*, was the weekly tenant of a house, and it appeared that he had disposed of two geysers and of some lead from the roof. His evidence was that he had intended to instal immersion heaters to do the geysers' work, and that he had replaced the lead with rubberoid because the roof leaked; and that he quite honestly believed he had the right.

The report bears the sub-title "Stealing Fixtures" and the charge was presumably made under the Larceny Act, 1916, s. 16: "every person who, being a tenant or lodger, or the husband or wife of any tenant or lodger, steals any chattel or fixture let to be used by such person in or within any house of lodging . . ." The point does not appear to have been taken that a roof is not a fixture; if it had been, I do not know that it ought to have succeeded. In *R.* v. *Rice* (1859), 28 L.J. M.C. 64, a conviction under 7 & 8 Geo. IV, c. 29, s. 44 ("steal, take and carry away any . . . fixed in or to any building": it was the next section that dealt with tenants), for stealing lead gutters was upheld; but it could be argued that a roof itself is not "an article of a personal [as opposed to real] nature which has been affixed to" the house or lodging.

The claim of right could have been based on *R.* v. *Phetheon* (1840), 9 Car. & P. 552, or *R.* v. *Medland* (1851), 5 Cox C.C. 292; these decisions dealt with the effect of pawning (in the second case property from furnished lodgings) and showed that ability to redeem is a vital consideration and may support a "claim of right" plea. More recently, *R.* v. *Bernhard* [1938] 2 K.B. 264 (Cr.A.) decided that such a claim—"a claim of right made in good faith" as s. 1 (1) of the Larceny Act, 1916, puts it—need not be a claim well founded in law.

However, the chairman of quarter sessions of whose summing-up the appellant in *R.* v. *Breed* complained had directed the jury: "You will consider whether in fact the prosecution has satisfied you that this man took these things—and took each of them separately—without any claim of right and with the intention to deprive the owner of them," and this the Court of Criminal Appeal considered adequate though sketchy. No doubt the jury would, as men and women of the world, use their knowledge of the way in which weekly tenants who prefer immersion heaters or who complain of leaking roofs normally behave.

R. B.

REVIEW

The Law of Torts. By HARRY STREET, LL.M., Ph.D., Solicitor, Professor of Law in the University of Nottingham. 1955. London: Butterworth & Co. (Publishers), Ltd. £2 5s. net.

Professor Street here makes a notable assault on established tradition. Teaching experience has made him dissatisfied with the hitherto accepted method of arrangement of text-books on tort, whereby general principles of the subject are expounded at length before the reader is introduced to the causes of action themselves, rather as in a Shavian preface. Accordingly, he re-orders the material so as to present it from the point of view of the interest of the plaintiff rather than that of the defendant's conduct, plunging almost straight away into a consideration of specific torts, and treating these in separate parts of the book according as intention or negligence do or do not enter into the matter and according as person, property, reputation or economic interests are affected. The new arrangement is much assisted by the adoption of an explanatory style in the headings and by the particularity of the classification: no student is likely to lose his way in the book.

The defect of the new plan (we do not suggest it is any worse than the shortcomings of the old chronology) is that somewhere or other the questions of remedy and parties, of vicarious liability, capacity and extinction must have their place, and here they come at the end of the book. They occupy about the last fifth of the text, we make it. All are fundamental, but there is probably as much to be said for engaging the interest of the student first and introducing him to the more practical difficulties later, as for the old-fashioned idea of grounding him from the start in the general principles in the light of which all the particular torts have to be viewed. Since learning the law is only indirectly a logical exercise, the author's concession to modern mental dissipation may well succeed.

Certainly the writing and the careful citation of useful authority deserve success.

HERE AND THERE

TOO OBVIOUS TO TELL

WE can never know what ordinary life was like in the past because no one was ever in his time such a crazy unconscionable bore as to set down what everybody knew. Of course there have been diarists and letter writers and chroniclers in plenty, but the most inveterate and prolific diarist or correspondent only records the unusual, the remarkable. The whole routine of his daily life, the normality of his surroundings, he takes for granted unmentioned, and so that is what passes into oblivion. If a man were to keep a perfectly accurate diary he would start with the very first opening of his eyes in the morning, the colour and feel of the bed clothes, the wallpaper, the ceiling, the curtains, the furniture, the clothes on the chair (or floor), the jumble of incongruous objects all over the place which mean actual living. Before he'd reached the point of putting his toe out of bed there would be matter to fill half an exercise book for a start. If that is true of history, it is just as true of the lives of all the living people who surround us in streets and shops and buses, the people of whose domestic life one may catch a brief glimpse from the railway through a lighted window looking across a back garden. The social inquirer would never dream of looking for the daily life of our times in the newspapers. It is precisely because they do not contain our daily life that we buy them. How full of incident life would be if the newspapers were really a faithful mirror of life. Take the court news alone. There was the boy who lassoed the buffer of an express train with a 30-foot rope with a steel oil drum fastened to the end of it. Then there were the nine youths ("dressed in the distinguished style adopted by young men these days") who forced people off the pavement at Richmond and fired air pistols at pigeons, so that a police inspector, hearing the shooting and the whine of missiles, took cover behind a wall. The inspector afterwards fired one of the pistols in court to demonstrate its force. There was the Underground stationmaster caught taking marked pennies from cloak-room locks, a perquisite of his office which carried him to Bow Street. Then there was the queer courtship of the young chimney-sweep of Haywards Heath who punched a girl every time she refused to speak to him. "When I punched her she would walk away and then I would go home."

PRIVATE LIVES

AH! Well for them both that she walked away and he went home, for if he had succeeded in punching her into matrimony (and one constantly sees marriages which one imagines can have been brought about in no other way) they would have been bound to figure, sooner or later, in the matrimonial court news and it is in the matrimonial court news that people seem to be at their oddest and most inexplicable, or is it then that one sees average daily life as it really is? Do all those solid dull-looking people swarming round us everywhere really behave like that in the privacy of their homes? One is not thinking of cases of melodrama like that of the husband, lately convicted, who was said to have forced his wife to join a gang of thieves breaking into Sussex houses. One is not thinking of cases of obvious precocity like that of the nineteen-year-old husband of Gallon, Ohio, who is suing his eleven-year-old bride for divorce on the ground of "gross neglect and extreme cruelty." One is getting a little closer to the oddity just beneath the surface in which the English seem to specialise in the case of the wife who recently sought a divorce for cruelty alleging that her husband practised the cult of nudism. On his insistence she had followed suit (if one may so put it) until she decided that, so far as he was concerned, it was less associated with high and healthy living than with "just plain sex." (There is something emphatically English about this discovery of the lady's.) But the sort of case that really makes one look twice at strangers and speculate about their home life was that of the gentleman who called himself a "pocket Hercules," claimed to be "a fighter whose ancestors for centuries kept the marches against the Scots" and also "a warrior descended from the Moorish fighters very long ago." He was in his middle sixties and about the house he wore khaki shorts, a white shirt, a school cap and a belt with the house keys dangling from it to show that he was master. He practised scales on the piano at six in the morning and sang scales in the tea-room of his wife's guest-house. Under the microscope of judicial process, women stand out just as oddly. There was the lady who wasted no time in getting down to the business of life as she meant to lead it, for she told her husband on their wedding night that she had only married him out of spite and to get a pension. One of her emotional outlets was to smear butter on the walls of a room he had just papered. Another was to sit by his bed with a carving knife, saying she would stab him if he went to sleep. Both those are quite recent cases. A third (for one must end cheerfully) points the way to successful marriage as practised (scarcely less strangely) by a man who went through four ceremonies of marriage, and was tried at the Leeds Assizes for double bigamy. His first marriage ceremony was with a woman already married. Later he was acquitted of aiding and abetting her to commit bigamy. His second marriage ceremony was legal. Two more followed it. Neither his wife nor her two successors, who all met amicably at the court, wanted him sent to prison and all gave him the character of an ideal husband. The judge let him off with a fine of £20, telling him: "It is time you stopped this kind of thing." So, amid general cries of relief, he was set free. And what is his formula for happy marriage? Here are his own words: "I'm no Adonis or Don Juan. I kept each of my wives happy by *never* answering back, *never* asserting myself and *always* giving them plenty of housekeeping money. And I always took them an early morning cup of tea in bed. Women don't like to lose a husband like me." In theory it's simple, isn't it? But it takes an artist in life to practise it on such a scale.

RICHARD ROE

A presentation was made to Mr. S. T. Apps on 4th April on his completion of fifty years' service with Messrs. Woodroffes, of Westminster Bridge Road, S.E.1.

Mr. Michael D. Arnold, solicitor, of West Bromwich, was married on 7th April to Miss Dawson, of Hinckley.

Mr. John Philip Richardson, solicitor, of Keighley, was married on 2nd April to Mrs. Joan Marjorie Woodward, of Riddlesden.

Mr. Geoffrey Ernest Harold Wildgoose, solicitor, of Matlock, Derbyshire, was married on 14th April to Miss Pamela Barbara Hubbard, of Shipley.

TALKING "SHOP"

April, 1956.

MUSINGS ON THE MUSEUM FILE

I wonder how many solicitors nowadays find it worth while to keep a museum file? Very few, I imagine. The day of the rugged freethinker is past; the English eccentrics are a dying race. But here and there in forgotten country districts there may yet survive some pockets of resistance to the drab and uniform, people who will eschew the double negative and watery civility and make bold to express themselves in good round Chaucer, incisive Swift or (at a pinch) rumbustious Rabelais. Let us hope so, for we live in an age that has grown leprous with euphemism. In such places a museum file may still justify its existence.

There was a time during the last two years of the war when I found myself chairborne in Middle East and India and kept a museum file. I had forgotten its existence until a more than usually vigorous spring-cleaning churned it recently to the surface. Like all good museum files it contains matter for instruction as well as entertainment. I am indebted, for example, to one Captain G. Limperatos for some pungent comments upon his correspondent's use of technical and Latin terms; though before I quote them, some preamble is necessary. First it is as well to explain that in those days there was no liability on the part of the Crown in tort, so that claims of that character were always settled "*ex gratia*" —a convenient phrase that served to maintain the convention of legal immunity. Secondly, as readers who occupied chairborne posts in certain theatres will be sure to remember, steel pins and glider clips were not ranked as munitions of war, so that it was necessary to use primitive substitutes. But I must allow Captain Limperatos to express himself in his own words :—

Dear Sir,

CLAIM IN RESPECT OF HEAVY MAUSER AUTOMATIC PISTOL AND 58 ROUNDS

I have much pleasure in acknowledging receipt of your Hitlerite ultimatum, dated 20.6.45. In reply I would like to point out that I am neither Checkoslovakia nor Bulgaria. The square foot of ground on which I stand is Spartan territory. Therefore I am returning the receipt and discharge forms duly *not* signed and pinned with the original thorn. The moment I saw that damn thorn I knew that our problem would be a thorny one; hence the pinpricks. Due to unavoidable circumstances I regret that I was unable to reply, as I intended to, on the 1st of April, which is—according to my astrologer—my lucky day. Anyhow I will do my best to make up for lost time.

At the beginning I should like to know, what do you mean by the cryptic remark "without prejudice"? It seems as if you assume that I am a fraud. And "*ex gratia*"? Although I am supposed to be a Latin scholar—the Governor of Burma presented to me as a prize "The History of The British Parliament Past and Present" for proficiency in Latin—still I cannot understand what you are driving at. You seem to labour under the delusion that you are giving me a present; very much the reverse has been the transaction between the Army and myself.

Mais revenons à nos moutons, black sheep mauser in this case. I cannot accept your award for the following reasons . . ."

I am sorry to have to admit that I have no notion how the affair Limperatos ended, but then that is the way with museum files. I can only hope that he persuaded the District Claims Officer to settle at a higher figure. A forced and rather silly letter, one may think, but in its own way instructive. "You seem to labour under the delusion that you are giving me a present." It was not, for the reasons already explained, a delusion, but the expression of a recognised principle of Crown immunity. None the less, the phrase "*ex gratia*" is ever suspect. There may be excellent reasons for using it (e.g., to avoid disastrous tax assessments); but if the truth be told the only gratuity that it sometimes stands for is the gratuitous insult that a face-saving defendant offers to the plaintiff when he chooses to employ the term. As for "without prejudice," as the choleric Limperatos observes, "it seems as if you assume that I am a fraud." Candour compels the uneasy admission that all too often it can mean nothing else; and "cryptic remark" is a description that cannot be bettered. But enough of Limperatos.

To illustrate the Oriental talent for vivid narrative I take the following description of a level-crossing accident, which has triumphantly survived the rigours of translation :—

"STATEMENT BY KHALIL ELAM.

I passed the Fidar crossing. I was far about 25 metres of it, when I heard a car stop on it. I had heard the whistle of the Diesel [engine on the railway]. I turned back to see if the car was exactly on the line or not. The driver was my brother; I told him to hurry and jump out of the car. He asked me why; I told him I heard the whistle of the Diesel, it is not too far from here. He tried to start the car, but vainly. He jumped out of it, and we both tried to push it back; we could not. We called to a neighbour of the crossing to help us; he came down and three of us pushed back. We had not enough time. The Diesel was arriving. We yelled to the driver of the engine. It seems that he did not hear us. The Diesel approached. I closed my eyes; he passed, I heard a crash . . ."

Imagine this dramatic scene rendered in police court English, and how very dull it would be! But Khalil Elam has made a first-class job of it. Like a true artist he opens gently. The first note of urgency is struck with a sudden change of tense ("it is not too far from here"). And as the Diesel approaches, alarming and inexorable, the victims struggle to avert catastrophe with leaden slowness; the whole thing has about it the lurid reality of a nightmare.

A different type of reality is introduced by the more phlegmatic evidence of Sapper A. Cooks, the driver of a train on the same railway, recounting another accident. "I sounded the hooter twice, at regulation intervals, just north of the warning board. An approaching car, ignoring the approach of the train, came off second best in conclusion. In spite of receiving damage to the rear of the car, the driver carried on, and so did I. If I am not mistaken, the same car driver has tried conclusions with my train on two previous occasions and got away with it." I have no doubt that I preserved this statement in the file as a painful reminder of the indifference of the British soldier to the value of government property. But, looking back at it after an interval of twelve years, I must confess to a sneaking regard for the stolid Sapper Cooks as he chases the Lebanese drivers with his expensive mass of government metal; evidently he held strong views about the local highway code.

Turning over the pages at random, I come across the humble petition of Aly and his brother Hassan Hussin Mohamed Hassan, respectfully addressed to His Majesty the Director of the British troops in Egypt, wherein the two brothers jointly and severally complain of infertile potato seed supplied by the army commissariat. A note at the foot suggests that the Staff Officer concerned was sceptical (and also, incidentally, that he cannot have been fully occupied) :—

> "Reference ye attached. It would seem to us fitting that Varlet Smith or yet maybe the Galedonian churl should forthright go to the village of Soubak el Gabry, and see forsooth whether these honest men Aly and Hassan his brother in fact did plant our spuds (if any). Maybe it should turn out that they sold our princely seed in the lean season at much profit, thereafter planting meaner stuff with no good results, except much profit to themselves and ye chance of some compensation to assuage their disappointment. Peradventure had our court jester not been in Assyria at this present time, he could a tale unfold, for great experience hath he in ye busted potato flush."

Amongst other bizarre incidents recorded in the same file, a favourite of mine concerns the sprightly Miss Gibson who "jumped out to accost the driver and get the policeman." I am also partial to the prank of the three South African soldiers, who, finding themselves in a lift with the Brazilian consul, "presented some live serpants"; in consequence there was "rough exercise between them and their victim" and a pane of glass in the lift was broken.

But none of these incidents can truly compete with those that, by sheer force of the ridiculous, stick in the recollection without the artificial aid of any file. Doubtless every practitioner carries about with him some such lumber. One instance, dating from the days of my articles, will suffice. It was the practice of the firm to type the name of the addressee at the foot of each page of any letter of more than one page, setting the name back into the margin and underlining it. Such a letter was written one day to the then Bishop of London, and it concerned a delinquent boy (for there were delinquent boys even in those days). Why the letter was written I have no idea, and it is immaterial. I was myself unaware that it had been written until the following morning when the Bishop's Chaplain was put through to me as the first arrival in the office. The Bishop's Chaplain was expressive and voluble and some of his language would have done little credit to Mr. Slope. I listened with growing consternation to his account of charges allegedly made by my firm against the Bishop, and, being in my youth ignorant of the quaint quirks of correspondents, I was seriously beginning to wonder whether someone in the office had committed an appalling gaffe. However, the letter was traced, and was found to read as follows: "Between these dates the boy was convicted of several offences and" (turn over) "was sent to Borstal." But, if you chose to adopt the system of reading favoured by the Bishop's Chaplain, it did make a big difference, like adding the date into a probate valuation. "Between these dates the boy was convicted of several offences and The Right Reverend the Bishop of London was sent to Borstal." I must own that once the Bishop's Chaplain had grasped the salient fact that the Bishop did not form part of our text for the day, he could not have been nicer about the whole thing.

"ESCROW"

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of "The Solicitors' Journal".]

Capital Punishment

Sir,—Mr. Walter H. Graham appeals to logic [p. 281, *ante*]; unto logic let him go. The abolitionists' case is, after all, that "capital punishment" is a contradiction in terms.

R. BORREGAARD.

London, E.C.4.

Agricultural Land on Trust for Sale: Payment for Repairs

Sir,—May I draw your readers' attention to a statement made on p. 256 of your issue of 7th April. I refer to the article on agricultural land held on trust for sale. It is there stated (in the second column) that as a result of the amendment of s. 73 (1) (iv) of the Settled Land Act by s. 96 (1) of the Agricultural Holdings Act, 1948, a tenant for life of *settled property* (as opposed to property held on trust for sale) which includes agricultural property "has the right to direct the trustees of the settlement to apply capital money in their hands in payment to him of his expenditure on, e.g., ordinary repairs to farmhouses and buildings, *if these repairs are not an obligation on the part of the tenant.*"

It seems to me, however, that the effect of the decision on *settled property* of *Re Lord Brougham and Vaux's Settled Estates* [1954] 1 Ch. 24 has been overlooked. It was there held by Vaisey, J., that the words at the end of para. 23 of Pt. II of Sched. III to the Agricultural Holdings Act, 1948, "other than repairs which the tenant is under an obligation to carry out" are *not* to be imported into the Settled Land Act, 1925, and that, therefore, improvements which can be paid for out of capital include "repairs to fixed equipment . . . reasonably required for the proper farming of the holding," *without qualification.*

It would, therefore, seem that line 18 in the second column of your article on p. 256 should have been omitted.

W. R. M. MAXWELL.

London, S.W.5.

Statutory Veterans

Sir,—Your correspondent Mr. F. H. E. Townshend-Rose [p. 281, *ante*] is clearly unfamiliar with the habits and customs of the Peerage. My great-great-grandfather George, son of the ninth earl, first stood for the Commons as Viscount Merton in the sixties of last century and allowed his name to be used in the Ballot Act, 1872. He continued to be a candidate at all succeeding general elections until his father's death in 1886, whereupon he became the tenth earl. The tenth earl's son (also called George, which is a family name) as Viscount Merton stood at the next two general elections, forfeiting his deposit at that of 1906, and succeeded as the eleventh earl in 1921. The new Viscount Merton stood at all general elections from that date until 1933 when on the death of his father he became the twelfth earl. His son George (my father) as Viscount Merton fought the general elections of 1935, 1945, 1950 and 1951, losing his deposit at that of 1945. My grandfather the twelfth earl died in 1952 whereupon my father became the thirteenth earl. I became Viscount Merton and was naturally a candidate at the 1955 general election. So far as I can ascertain, no member of my family has ever been successful, not even in 1931, since it is our traditional duty to contest safe seats held by the Liberal or Labour parties. Finally, my father asks me to say that while he admits to being tough he is definitely not old.

MERTON.

Swanworth,
Berks.

NOTES OF CASES

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Court of Appeal

CROWN PRACTICE: COURT OF APPEAL: RIGHT OF APPELLANT TO APPEAL IN PERSON FROM REFUSAL OF PREROGATIVE WRIT

R. *v.* Staff Sub-Committee of London County Council's Education Committee and Another; *ex parte* Schonfeld and Others

Denning, Morris and Romer, L.JJ. 28th February, 1956

Preliminary objection on appeal from Divisional Court.

Eight out of the twelve governors of a voluntary school, including their chairman, appeared in person on an appeal from the dismissal by the Divisional Court (Lord Goddard, C.J., Ormerod and Barry, JJ.) on 28th October, 1955, of their application for an order of certiorari to quash the decision of the staff sub-committee of the Education Committee of the London County Council, refusing consent to the dismissal of the headmaster. Counsel for the headmaster sought to make a preliminary objection that the appellants were not entitled to appear in person. The court, after conferring, decided that they would hear the appeal on the merits and rule on the preliminary objection later. They directed that all the eight appellants should attend before the court so that if any desired to address the court individually they might do so.

DENNING, L.J., said that the foundation governors did not instruct counsel to appear before the court, but appeared individually in person. The only one of them who put forward sustained arguments was the chairman, who, of course, could speak only for himself and not for others. The vice-chairman also addressed the court for a few minutes. It was submitted by counsel for the headmaster that the foundation governors could not appear in person, but only by counsel on such an application; and he referred to the observations of Scrutton, L.J., on 22nd November, 1929 (*The Times*, 23rd November, 1929, "Colonel Kynaston's Appeal") that "... [the] court had made it a rule, and had acted on it for a hundred years, that persons coming to apply for the prerogative of mandamus must do so by counsel, and must be represented by counsel." Counsel had told the court, however, that the Divisional Court in 1947 had departed from that rule. Lord Goddard, C.J., had said that the judges had decided that prerogative orders might be moved for by litigants in person (*Practice Note* [1947] W.N. 218). His lordship thought they should do the same. Much as they valued the help of the Bar, they must never go so far as to refuse an applicant simply because he was in person.

MORRIS, L.J., said that there were often reasons why it was helpful from the point of view of the court that there should be appearance by counsel in cases of this kind. The eight appellants, however, had appeared personally. His lordship saw no reason for not allowing the chairman and his colleagues to appear in person, though, the interest being a joint one, the court would not have arguments from each one separately.

ROMER, L.J., agreeing, said that having regard to the established practice of the court it was quite plain that the chairman could not appear on behalf of the other governors as well as on behalf of himself; but he was entitled to address the court on his own behalf, and he did so. The substance of his arguments and submissions was adopted in effect by his fellow governors. Preliminary objection overruled.

APPEARANCES: *Geoffrey Lawrence*, Q.C., and *H. E. Francis* (*Solicitor, London County Council*); *Viscount Hailsham*, Q.C., *A. L. J. Lincoln* and *Quintin J. Iwi* (*Edward F. Iwi*).

[Reported by Miss M. M. HILL, Barrister-at-Law] [1 W.L.R. 430

ESTATE DUTY: SETTLED INTEREST: WHETHER ARISING ON SETTLOR'S DEATH

***In re* Parkes' Settlement; Midland Bank Executor and Trustee Co., Ltd., and Another *v.* Inland Revenue Commissioners**

Lord Evershed, M.R., Jenkins and Birkett, L.JJ. 12th March, 1956

Appeal from Danckwerts, J.

By a settlement made in 1929, E. T. Parkes, who died in 1952, directed his trustees to stand possessed of the settled property on trust during his lifetime to pay the income of the trust fund equally to his two daughters so long as they both remained alive and unmarried, but so that the amount paid to each daughter was not to exceed £250 in any year, or if one of them died or married, the income payable to the other should not exceed £410 in any year. Subject to this trust the income of the surplus of the fund was to be paid equally between the surviving children of the settlor. After the death of the settlor the trustees were directed to appropriate in respect of such of the daughters as should then be unmarried a fund sufficient at that time to produce an annuity of £250 each year for her life, to be paid so long as she continued unmarried. The trustees were empowered to resort to the capital of the appropriated fund to make good any deficiency of the annual income of that fund. Subject to those trusts, the capital and income of the trust fund, including any surplus income of the appropriated fund, was to be held on trust for such of the settlor's children as should survive him and if more than one in equal shares absolutely. All the four children of the settlor survived him and both the daughters had remained unmarried. The Crown claimed estate duty under s. 2 (1) (*d*) of the Finance Act, 1894, first in respect of the annuities which became payable to the daughters out of the appropriated funds on the death and, secondly, in respect of the corpus of the settled property to which the four children of the settlor became absolutely entitled at his death. Danckwerts, J., decided in favour of the Crown on both points and the trustees appealed. For the purpose of the appeal it was agreed that the income of the trust fund at all material times could be treated as having amounted to not less than £500.

LORD EVERSHED, M.R., said that duty was payable under s. 2 (1) (*d*) in respect of the absolute interest taken by the four children in the corpus of the settled property at the death of the settlor, for that interest was distinct and different in kind and quality from their right to share in surplus income during the settlor's lifetime and the beneficial enjoyment of that absolute interest was contingent on surviving the settlor. As regards the daughters' annuities, duty was not, however, payable under the section. Applying the rule in *Inland Revenue Commissioners* v. *Duke of Westminster* [1936] A.C. 1, it was the duty of the court to determine liability to duty by reference to the legal effect of the settlement, but on the other hand "beneficial interest" in s. 2 (1) (*d*) of the Finance Act, 1894, ought not to be construed as referring exclusively to the technical forms of conveyancing: see *Coutts and Co.* v. *Inland Revenue Commissioners* [1953] A.C. 267, 283, and *In re Duke of Norfolk* [1950] Ch. 467, 488. Although there was a difference in the incidents of the daughters' rights before and after the settlor's death, particularly as regards the security of those rights, there was no essential difference in beneficial enjoyment, such as would give rise to a charge for duty under the section. In order to do that there must, *prima facie*, be a change on the death, not merely of the source or title, but of possession or enjoyment.

JENKINS, L.J., agreed. His lordship referred to *D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners* [1953] A.C. 347.

BIRKETT, L.J., agreed. Appeal allowed in part.

APPEARANCES: *J. Pennycuick*, Q.C., *S. M. Young* (*Baddeleys & Co.*); *E. Blanshard Stamp* (*Solicitor of Inland Revenue*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [1 W.L.R. 397

LANDLORD AND TENANT: ACTION FOR ARREARS OF RENT AND POSSESSION AGAINST JOINT TENANTS: JUDGMENT AGAINST ONE: APPLICATION BY BOTH FOR RELIEF FROM FORFEITURE

Gill and Another *v.* Lewis and Another

Singleton, Jenkins and Hodson, L.JJ. 14th March, 1956

Appeal from Pearson, J., in chambers.

By s. 212 of the Common Law Procedure Act, 1852: "If the tenant ... shall, at any time before the trial in such ejectment, pay or tender to the lessor ... all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued ..." By

s. 46 of the Supreme Court of Judicature (Consolidation) Act, 1925: "In the case of any action for a forfeiture brought for non-payment of rents, the High Court or a judge thereof shall have power to give relief in a summary manner, and subject to the same terms . . . as could formerly have been imposed in the Court of Chancery . . ." The defendants, *L* and *W*, had been granted as joint lessees a tenancy of two dwelling-houses. They proved, according to the plaintiff lessors, to be bad payers of the rents and when it was sought to enforce payment of arrears by legal proceedings one or both of them could not be found for service of the writ. On 1st April, 1955, the arrears of rent then amounting to £412 10s., the plaintiffs issued a writ claiming the arrears and costs, and also possession of the premises. The writ was served on *W*, but could not be served on *L*, who, it was later ascertained, was in prison, having been convicted of indecent assaults on boys in one of the leased houses and sentenced to two years' imprisonment. Appearances were entered for both defendants, but neither appeared at the trial and the plaintiffs signed judgment in default against *W* alone. Before the signing of judgment, £400 was paid by the defendants by way of arrears of rent and afterwards the balance of the arrears and the costs were also paid. On 13th July, 1955, the defendants applied by summons for relief from forfeiture under s. 46 of the Supreme Court of Judicature Act, 1925, and s. 212 of the Common Law Procedure Act, 1852. The master granted relief and his decision was upheld by Pearson, J. The plaintiffs appealed.

JENKINS, L.J., said that to get an effective judgment for possession against joint tenants, judgment must have been obtained against both of them; the reference in s. 212 to "the trial" must be an effective trial binding on all necessary parties. As there had been no "trial," and as the rent and costs had been paid or tendered, the section applied and "all further proceedings" in the action "shall cease and determine." That was enough to dispose of the case, but arguments had been presented on the question of relief from forfeiture. The plaintiffs contended that the defendants were undesirable and unmeritorious and that it would be inequitable to grant a relief so as to saddle the plaintiffs with them further; the defendants contended that it was only in most exceptional cases that relief would be refused when all the rent and costs had been paid. An examination of the cases led to the conclusion that, save in exceptional circumstances, the function of the court in exercising the equitable jurisdiction under s. 46 of the Act of 1925 was to grant relief when everything had been paid up, and, in general, to disregard other causes of complaint which the landlord might have against the tenant. There might be very exceptional cases in which relief would be refused, such as when the premises were consistently used for immoral purposes, but the charge against *L* did not constitute such an exceptional case. A further point which had not been argued was that service of the writ on one joint tenant constituted good service on all; see note to Ord. 9, r. 9, in the Annual Practice. That point should be regarded as open in future cases. The order below should be varied on the footing that the proceedings should cease and determine.

SINGLETON and HODSON, L.JJ., agreed. Appeal dismissed. Order varied.

APPEARANCES: *C. Grundy* (*Pettiver and Pearkes*); *C. E. Rochford* (*Greene & Underhill*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [2 W.L.R. 962

CHOSE IN ACTION: DEBT: ASSIGNMENT: DATE OF ASSIGNMENT WRONGLY STATED IN NOTICE TO DEBTOR

W. F. Harrison & Co., Ltd. *v.* Burke

Denning, Morris and Parker, L.JJ. 15th March, 1956

Appeal from St. Helens County Court.

By s. 136 of the Law of Property Act, 1925: "(1) Any absolute assignment by writing under the hand of the assignor . . . of any debt or other legal thing in action, of which express notice in writing has been given to the debtor . . . is effectual in law . . . to pass and transfer from the date of such notice—(*a*) the legal right to such debt or thing in action; (*b*) all legal and other remedies for the same; and (*c*) the power to give a good discharge for the same without the concurrence of the assignor . . ." On 6th December, 1954, the defendant owed some £33 unpaid instalments under a hire-purchase contract, and was further liable to pay in due course some £170 in respect of future instalments. On 7th December, the creditors assigned to the plaintiffs a purported debt of £203 said to be owed by the defendant. The plaintiffs sent to the defendant a notice, dated 6th December, but not despatched until 8th December, stating that "the debt amounting to £203" had been assigned to them by "an indenture dated 7th December." In an action brought to recover arrears under the contract, the county court judge gave judgment for the defendant. The plaintiffs appealed.

DENNING, L.J., said that the amount of the debt had been wrongly stated, because the sum owing on the date of the assignment was only £33. Apart from that, the date of the assignment had been wrongly stated as the 6th December, whereas it was in fact the 7th. The question was whether that misstatement made the notice bad. In *Stanley* v. *English Fibres Industries, Ltd.* (1899), 68 L.J.Q.B. 839, it was so held, and rightly. By s. 136 (1) of the Law of Property Act, 1925, notice in writing of the assignment was an essential part of the transfer of title to the debt, and, as such, the requirements of the Act must be strictly complied with and the notice must be accurate as to the date of the assignment. Further, it would also appear that the notice should also state accurately the amount of the debt. On the ground that the date had been misstated, the notice failed to comply with the Act and was bad.

MORRIS and PARKER, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *William Morgan* (*R. I. Lewis & Co.*, for *Goldrein & Co.*, Liverpool).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 419

LEGAL AID: CERTIFICATE LIMITED TO OBTAINING COUNSEL'S OPINION: VALIDITY

The Law Society *v.* Elder

Lord Evershed, M.R., Denning and Birkett, L.JJ.

21st March, 1956

Appeal from Bloomsbury County Court.

The defendant applied for legal aid to proceed in the Chancery Division for a declaration granting him full United Kingdom citizenship. He agreed to contribute £38 towards the cost, £2 5s. being payable on acceptance and the remainder by monthly instalments. He was granted a civil aid certificate which was expressly limited to "obtaining opinion of leading counsel versed in constitutional law." The opinion of Mr. D. N. Pritt, Q.C., was taken, but as it was to the effect that the defendant's contention was unlikely to be successful in the courts, no proceedings were taken. The defendant defaulted in payment of the agreed instalments of his contribution and sought to resist a claim by the plaintiffs for the sum unpaid on the ground that the civil aid certificate which had been granted to him was invalid because it was not granted for or in connection with proceedings, but for the purpose of taking the advice of counsel, and that, accordingly, the plaintiffs could not require him to pay his assessed contribution. The total cost to The Law Society of obtaining counsel's opinion was over £80. The county court judge held that there was no defence to the action and the defendant appealed.

LORD EVERSHED, M.R., said that whatever objections the defendant might have to the validity of the grant of the certificate, he had executed a form of acceptance of the offer of a certificate which created a contract. The certificate was, moreover, valid. It was incorrect to say that the provisions of s. 1 (5) of the Legal Aid and Advice Act, 1949, related only to cases in which proceedings had been actually started. It must cover cases where proceedings were genuinely contemplated as being the appropriate step then to be taken, though they had not yet in fact been taken. The certificate in question was expressly related to contemplated proceedings, but the advice of counsel was to be taken first for the very good purpose of seeing whether it would be proper to expend public money on the prosecution of the contemplated proceedings.

DENNING and BIRKETT, L.JJ., agreed. Appeal dismissed.

APPEARANCES: (The defendant appeared in person); *Rodger Winn* (*James and Charles Dodd*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] [2 W.L.R. 941

AGRICULTURAL HOLDING: LETTER REPLYING TO NOTICE TO QUIT: WHETHER EFFECTIVE COUNTER-NOTICE

Mountford and Others *v.* Hodkinson

Lord Evershed, M.R., Birkett and Romer, L.JJ.

23rd March, 1956

Appeal from Leek County Court.

On 12th March, 1954, the landlord of an agricultural holding near Leek, Staffordshire, which was let on a Lady Day tenancy to the defendant, served on the tenant a notice determining the tenancy on 25th March, 1955. On 15th March, 1954, the tenant replied: "In reply to your notice . . . I don't intend to go, I shall appeal against it and take the matter up with the A.E.C." [the Agricultural Executive Committee]. "As you have no grounds on which to evict me I don't owe you anything if you did not have your rent direct you had it indirect you had bills amounting to just over £60 that I paid for material to the place last year and now you are prepared to be dirty you can begin sharp and make an application for a government grant for some stone for the road its your job and I shall have the sanitary inspector to the house and the milk production officer to the building and put you to a bit of expense now you are not satisfied having it done for nothing." On 4th January, 1955, the landlord died, and on 23rd February, 1955, probate was granted to the plaintiffs. After the notice to quit expired, the plaintiffs, as landlords, brought proceedings in the county court for possession. It was not disputed that the notice to quit was appropriate in all respects, but the tenant sought to rely on his letter of 15th March, 1954, as constituting an effective counter-notice for the purposes of s. 24 (1) of the Agricultural Holdings Act, 1948. The county court judge decided in favour of the landlords and ordered that possession should be given to them in three months. The tenant appealed.

LORD EVERSHED, M.R., said that s. 24 (1) of the Act of 1948 provided that the tenant's counter-notice had to be in writing requiring that subs. (1) should apply, but by ordinary standards of language and common sense the letter in question did not do that. Notices or counter-notices of this sort were not to be construed strictly and they should be held to be effective if they indicated such a "clear intention" (see *Price* v. *Mann* (1942), 58 T.L.R. 197, *per* Lord Greene, M.R.) to invoke the right which the Act gave that a landlord could not reasonably mistake what was meant. There was, in the present case, no sufficiently clear intention and the letter was not an effective counter-notice.

BIRKETT and ROMER, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *R. E. Megarry* (*Gibson & Weldon*, for *Bowcock & Pursaill*, Leek, Staffs); *Peter A. Ferns* (*Collyer-Bristow & Co.*, for *Wilkins & Thompson*, Uttoxeter, Staffs).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] **[1 W.L.R. 422**

LANDLORD AND TENANT: COVENANT FOR QUIET ENJOYMENT: SCAFFOLDING ERECTED IN FRONT OF SHOP

Owen *v.* Gadd and Others

Lord Evershed, M.R., Birkett and Romer, L.JJ.

26th March, 1956

Appeal from Judge Reid sitting at Kingston-upon-Thames County Court.

By a lease of 13th October, 1955, landlords demised to the plaintiff a lock-up ground floor shop, reserving to themselves the floor above the shop. The tenant covenanted to use the demised premises for certain specified retail trades and the lease contained a common form covenant by the landlords for quiet enjoyment. Three days after the grant of the lease, contractors, instructed by the landlords, erected on the pavement in front of the shop scaffolding for the purpose of carrying out repairs to the landlords' upper premises. It was not disputed that the access to the tenant's shop and the shop window was to some extent obstructed by the scaffolding. The landlords did what they could to minimise the damage and the repairs were completed and the scaffolding removed in under a fortnight. The tenant claimed damages for breach of the landlords' covenant for quiet enjoyment. The county court judge held that the erection of the scaffold poles in close proximity to the shop window constituted a breach of the covenant for quiet enjoyment, but he held that no special damage had been proved, and awarded to the plaintiff 40s. damages. The landlords appealed.

LORD EVERSHED, M.R., said that, *prima facie*, the language of the covenant would suffice to cover any act on the lessors' part which prevented the lessee from the enjoyment of the premises demised to him for the purposes for which they were demised. The question whether the quiet enjoyment had been interrupted was one of fact and the county court judge was well justified, on the evidence, in concluding that the interruption was as a fact substantial even though it did not last for very long. But there remained the question whether the nature of the obstruction was of a kind capable of constituting a breach of covenant. He (his lordship) was prepared to assume that the interruption must at least be of a direct and physical character, but it was not necessary for there to be an actual physical irruption into or upon the premises demised on the part of the landlords or some person authorised by them. Therefore the judge was entitled to find as a fact that the interference was substantial and that there was no principle of law which disqualified him from concluding as he did.

BIRKETT, L.J., agreed.

ROMER, L.J., agreeing, said that the facts that the work of external repair which the lessors put in hand was reasonably necessary, was efficiently done and was done with all reasonable speed were not considerations relevant to the question whether there had been a breach of the covenant. Appeal dismissed.

APPEARANCES: *Stephen Chapman*, Q.C., and *John D. May* (*George C. Carter & Co.*); *T. L. Dewhurst* (*George E. Baker*).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law] **[2 W.L.R. 945**

RATES AND RATING: MECHANISED BAKERY AND REPAIR SHOP ON OPPOSITE SIDES OF STREET

Gilbert (Valuation Officer) *v.* S. Hickinbottom & Sons, Ltd.

Denning, Morris and Parker, L.JJ. 26th March, 1956

Case stated by the Lands Tribunal.

Ratepayers owned and occupied premises on opposite sides of a street, those on the south being a large mechanised bakery and those on the north being used as a depot for the repair and maintenance of the delivery vans and of the machinery in the bakery. The two premises were entered as one hereditament in Pt. II of the valuation list. It was essential that facilities for the repair of the bakery plant should be available either in the bakery or close thereto in order that the supply of bread to customers should not be interrupted by a breakdown. The Lands Tribunal, on appeal, rejected proposals by the valuation officer that the premises ought to be entered in the valuation list as two separate hereditaments, the bakery in Pt. II and the repair depot in Pt. I. The tribunal held that the use of the repair depot was so essential to the proper working of the bakery that the two premises should be treated as one hereditament. The valuation officer appealed.

DENNING, L.J., said that the case raised the question, what was a separate hereditament for rating purposes? The long-established practice warranted certain general rules: (1) where two or more properties were within the same curtilage or were contiguous, and were in the same occupation, they were in general to be treated as forming part of a single hereditament; (2) where two properties were in the same occupation but were not within the same curtilage, nor contiguous, they must ordinarily be treated as separate hereditaments; (3) where two properties were separated by a highway, they should normally be treated as separate hereditaments. The present case fell within the third rule. But there were exceptions, as when the grounds of a park, farm or golf course were bisected by a public road; in such cases the two properties were so essential in use to one another that they should be regarded as a single hereditament. The question whether the present case fell within the general rule or the exception was one of degree, and therefore of fact for the tribunal, so long as it directed itself properly. Cases such as *Glasgow University* v. *Assessor for Glasgow* [1952] S.C. 504, where the tribunal of fact held that two properties on opposite sides of a road were separate hereditaments though part of the same undertaking, had been cited both to the tribunal and the

court. It was difficult to find a distinction between them and the present case, but the chairman of the tribunal had done so; his decision was one to which he could reasonably come, and the court could not reverse it.

MORRIS, L.J., agreeing, said that it would not be right to lay down hard-and-fast rules regarding the tests to be applied. Usually the geographical test would have very great weight, but the tribunal had not erred in law in adopting the functional test.

PARKER, L.J., agreed. Appeal dismissed.

APPEARANCES: *C. P. Harvey*, Q.C., and *Patrick Browne* (*Solicitor of Inland Revenue*); *Harold Williams*, Q.C., and *J. F. Bourke* (*Gregory, Rowcliffe & Co.*, for *Shakespeare & Vernon*, Birmingham).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[2 W.L.R. 952**

Chancery Division

PRACTICE: TRANSFER OF ACTION TO PALATINE COURT AFTER DATE OF HEARING FIXED: MOTION TO DISCHARGE ORDER OF DISTRICT REGISTRAR

Fullerton *v.* Ryman

Upjohn, J. 16th March, 1956

Motion to discharge order of district registrar.

After an action had been set down for hearing and the date for the hearing had been fixed in the Chancery Division list, the plaintiff applied for and obtained an order from the district registrar transferring the action to the Palatine Court in Liverpool. The defendant sought by motion to have the order discharged.

UPJOHN, J., said that in *Harrington* v. *Ramage* [1907] W.N. 137 it was held that a motion to set aside or vary a master's order ought to be dismissed without going into the merits, as the proper course for a dissatisfied party was to ask the master to adjourn the matter to the judge. That did not cover the present case, as the date for the hearing had already been fixed when the application was made; the district registrar should not have heard it, but should have adjourned it immediately into court. The motion must therefore be heard on the merits. There was no doubt that there was jurisdiction under s. 1 of the Court of Chancery of Lancaster Act, 1952, to make the order of transfer. But, although Liverpool would be a more convenient venue for the witnesses, the transfer would cause a further delay in the hearing of an action already long delayed, and the order should be discharged. Motion granted.

APPEARANCES: *H. E. Francis* (*T. D. Jones & Co.*, for *J. R. Williams, Davies & Co.*, Colwyn Bay); *A. C. Sparrow* (*Bell, Brodrick & Gray*, for *Henderson & Hallmark*, Llandudno).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 428**

Queen's Bench Division

NEGLIGENCE: COLLISION: LORRY DRIVER CROSSING ROAD FOR REFRESHMENT: LIABILITY OF MASTER

Crook *v.* Derbyshire Stone, Ltd., and Another

Pilcher, J. 20th February, 1956

Action.

The second defendant, *T*, a lorry driver employed by the first defendants, D. S., Ltd., was engaged in driving loads of stone from the company's quarries to a building site. The journey took about four hours, and it was *T's* practice to stop for refreshment on the way; the company were aware of this and impliedly authorised it. *T* left his vehicle to go to a café, and while crossing the road he was involved in a collision with the plaintiff, a motor-cyclist, who sought to establish the company's liability for *T's* negligence.

PILCHER, J., said that a master was not necessarily responsible for the consequences of acts committed by his servants during their period of employment, unless the particular act negligently performed was an act which the servant was employed to perform. If *T* had been employed to deliver some portable goods to the café, his employers would almost certainly have been liable. But *T* was not employed to cross the road; he did so for his own purposes, though, no doubt, with the approval of his employers. He had no duty to perform for them until he returned to the lorry. The case was entirely different from *Century Insurance Co., Ltd.* v. *Northern Ireland Road Transport Board* [1942] A.C. 509, where the driver of a petrol lorry negligently caused a fire during the time when petrol was being delivered into a customer's tank; he was then employed on his master's work. Judgment for the first defendants and against the second defendant.

APPEARANCES: *A. E. James* (*T. H. Ekins & Son*, Birmingham); *P. Bennett* (*Hewitt, Woollacott & Chown*); *A. J. Flint* (*John Whittle, Robinson & Bailey*, Manchester).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 432**

ESTATE AGENT'S COMMISSION: "BINDING CONTRACT": CONTRACT RESCINDED OWING TO INNOCENT MISREPRESENTATION OF AGENT

Peter Long & Partners *v.* Burns

Lord Goddard, C.J. 21st March, 1956

Action.

By a contract in writing contained in a commission note and entered into between the defendant, the owner of a garage, and the plaintiffs, who were estate agents, it was agreed that the plaintiffs' commission should be payable upon their "introducing a person ready, willing and able to enter into a binding contract to purchase" the property. A purchaser signed a contract to purchase the property and paid a deposit after being informed by a representative of the plaintiffs that a town planning scheme then in force would affect the property only to a very limited extent. The purchaser, who subsequently discovered that the scheme would in fact result in the buildings on the site being demolished, resiled from the contract before completion, and the contract was eventually cancelled by agreement between the parties on payment of a certain sum by the purchaser to the defendant. The plaintiffs claimed their commission, but the defendant refused to pay. In an action by the plaintiffs for damages for breach of contract, it was agreed that the purchaser had been induced to sign a contract by, *inter alia*, the statement made by the plaintiffs' representative.

LORD GODDARD, C.J., said that difficult points often arose in such a type of case, as house agents tried to frame their commission notes in such a way as to avoid the decisions of the courts. It had been clearly laid down that, in the absence of special terms or circumstances, agents should be remunerated out of the purchase money when a sale went through. The question was as to the meaning of "binding contract." That meant, in the present context, a contract which could be enforced by the vendor against the purchaser; the purchaser had rescinded on the ground of innocent misrepresentation, as he had the right to do while the contract was still executory. It would have been otherwise if there had been completion, and it might be that there could be no "binding contract" until completion. This was not departing from *Midgley Estates, Ltd.* v. *Hand* [1952] 2 Q.B. 432 where the purchaser, after signing the contract, failed to complete owing to lack of money; in that case the contract was binding on the purchaser. Judgment for the defendant.

APPEARANCES: *P. Dow* (*J. J. Dunnett*); *J. Stirling*, Q.C. (*Torr & Co.*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 413**

LEGAL AID: SUMMONS FOR REVIEW OF TAXATION: NO POWER TO ORDER TAXATION OF COSTS OF SUMMONS UNDER 1949 ACT

Rolph *v.* Marston Valley Brick Company, Ltd.

Devlin, J. 27th March, 1956

Chambers summons.

A civil aid certificate under the Legal Aid and Advice Act, 1949, entitled a plaintiff, an infant, to legal aid as plaintiff in connection with proceedings described on the certificate as "prosecuting an action . . . for damages for personal injuries, and to enforce any order for costs." The action was compromised by the defendants consenting to judgment for £1,500 with costs and the settlement was approved by an order of Jones, J., under

which a certain sum was paid into court bearing a first charge under s. 3 (4) of the Act and which contained a direction that the plaintiff's costs be taxed as between solicitor and client in accordance with Sched. III to the Act. On taxation the taxing master disallowed, both as against the defendants and in the legal aid taxation, certain items in the plaintiff's solicitor's bill of costs, amounting to £40 5s. (the greater part of which was concerned with the fees of counsel in connection with a view of the scene of the accident). As between party and party the master's decision was accepted, but the plaintiff's solicitor, having obtained authority from the legal aid committee to lodge an interlocutory appeal under reg. 14 (3) (*c*) of the Legal Aid (General) Regulations, 1950, took out a summons for a review of the solicitor and client taxation. The summons was dismissed and application was made for an order under reg. 18 (3) (*b*) directing that the costs of the summons be taxed under the Act of 1949. Devlin, J., delivered judgment in open court.

DEVLIN, J., reading his judgment, said that the legal aid scheme made no provision for any party being heard on the legal aid taxation except the solicitor himself, and the Legal Aid (General) Regulations, 1950 (as amended), said nothing about the costs of a taxation or of any appeal arising from it or of how they were to be borne. The Legal Aid Fund was the solicitor's paymaster, but it was not his client. Where the lay client was going to pay the solicitor was at once subjected to a conflict between his own interest and his duty to the client in whose name he was still acting. In ordinary life the solicitor would at once go to his client and tell him he must place his affairs in other hands. If he did, the curious result might follow that the client might apply for a fresh grant of legal aid to fight his former solicitor. If the client got one, could his old certificate conceivably be regarded as still covering his former solicitor? Yet, if the lay client was not heard, injustice might result. His lordship thought that probably he ought to have dismissed the summons at the outset on the ground that the solicitor was acting without the authority of the client in whose name he was purporting to act. He could not be heard to say that the plaintiff was his client, for, if she was, he would be acting in breach of duty towards her by seeking to obtain money from her estate partly for his own benefit. The notion that the solicitor was still acting for his nominal client was a fiction that was maintained so that the legal aid scheme might still be made applicable, and the court had always set its face against fictions of that sort. But he had not felt it necessary to incur the expense of further argument on that point. His lordship said that before he could give the direction sought he must, under reg. 18 (3) (*b*), be satisfied of two things: first, that the proceedings before him were "proceedings to which an assisted person is a party," and secondly, that he was giving judgment or making a final order in those proceedings. There was a distinction between final judgments and orders and interlocutory judgments and orders, and since the order dismissing the summons fell into the latter category he was without power to make the order for taxation. Even if the order of Jones, J., could be construed as covering proceedings which had not then taken place, it could not cover the summons for review, for his jurisdiction, under the regulations, was limited to "proceedings to which the assisted person is a party." The certificate described the proceedings as an action by the plaintiff "for damages for personal injuries, and to enforce any order for costs"; a summons for a review of taxation could not come within that description, and the assisted person was not a party in the sense contemplated by the certificate. The position was not improved by the authority from the legal aid committee under reg. 14 (3) (*c*), for that regulation dealt only with proceedings that were within the certificate. Nor would it assist to amend the certificate to include in the proceedings therein described the summons for review: reg. 5 (2) provided that a certificate should not relate to more than one action, cause or matter, and reg. 8 (1) (*b*) that a certificate might be amended "to extend to other proceedings, being part of the same action, cause or matter to which the certificate relates," and in his lordship's judgment a matter in which a solicitor was seeking to have a review of the taxation of his bill against a client was one that was wholly distinct from the action out of which the bill arose, and so an amendment which included the summons for review would be *ultra vires*. On those grounds, he refused the application for an order that the applicants' costs be taxed under the Act of 1949. Application refused. Leave to appeal.

APPEARANCES: *John Ritchie* (*Cliftons*).

[Reported by Miss J. F. LAMB, Barrister-at-Law] **[2 W.L.R. 929**

IN WESTMINSTER AND WHITEHALL

HOUSE OF LORDS

PROGRESS OF BILLS

Read First Time:—

Bristol Corporation Bill [H.C.] [10th April.
Clean Air Bill [H.C.] [11th April.
Pensions (Increase) Bill [H.C.] [10th April.

Read Second Time:—

Barry Corporation (Barry Harbour) Bill [H.C.] [10th April.
Department of Scientific and Industrial Research Bill [H.L.] [10th April.
Edinburgh Corporation Bill [H.C.] [10th April.
Ipswich Dock Bill [H.C.] [10th April.
Justices of the Peace Act, 1361 (Amendment) Bill [H.C.] [10th April.

Read Third Time:—

Dover Corporation Bill [H.C.] [11th April.
Huddersfield Corporation Bill [H.L.] [11th April.

In Committee:—

Rabbits Bill [H.L.] [10th April.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read Third Time:—

Agricultural Mortgage Corporation Bill [H.C.] [11th April.
Small Lotteries and Gaming Bill [H.C.] [13th April.

In Committee:—

Restrictive Trade Practices Bill [H.C.] [12th April.

B. QUESTIONS

INCOME TAX (SCHOOL FEES)

The CHANCELLOR OF THE EXCHEQUER said that the Income Tax Acts provided that a parent should not be given relief from tax on payments for school fees which he made under a deed of covenant or otherwise for the benefit of a child who was under twenty-one and unmarried, if they exceeded £5 a year in the aggregate. The law also made illegal reciprocal arrangements under which uncles took out such covenants for each other's nephews. [10th April.

SHIPOWNERS' LIABILITY (DRAFT CONVENTION)

Mr. WATKINSON said he was aware of the judicial opinion expressed in the *Landseer* case reported at (1955), 2 Lloyd's Rep. 554, that, the limit of liability in merchant shipping cases having been fixed nearly 100 years ago when the value of money was greater, the size of a limitation fund might be quite out of line with the realities of a case. [11th April.

DOG LICENCES (PROSECUTIONS)

The HOME SECRETARY stated that in 1954 in England and Wales there had been 10,663 prosecutions for offences against the law relating to dog licences. [12th April.

STATUTORY INSTRUMENTS

Aberdeen-Huntly-Fochabers Trunk Road (Lipsden, Ramstone and Bogside Diversions) Order, 1956. (S.I. 1956 No. 514.)
Aberdeen-Huntly-Fochabers Trunk Road (Mid Bog and Peterden Diversions) Order, 1956. (S.I. 1956 No. 515.)
Act of Sederunt (Amendment of Fees in the Departments of the Registers of Scotland and of the Records of Scotland), 1956. (S.I. 1956 No. 530 (S. 25).) 8d.
Cleveland Water (Scaling Reservoir) Order, 1956. (S.I. 1956 No. 488.)
Connel-Glencoe Trunk Road (Drumnavuie Bridge Diversion) Order, 1956. (S.I. 1956 No. 481.)
County Court Fees (Amendment) Order, 1956. (S.I. 1956 No. 501 (L. 4).) See p. 267, *ante*.
Glasgow-Greenock-Monkton Trunk Road (Laigh Hatton Diversion) Order, 1956. (S.I. 1956 No. 482.)
Gretna-Stranraer-Glasgow-Stirling Trunk Road (Snabhead Diversion) Order, 1956. (S.I. 1956 No. 516.)
Hollow-Ware Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1956. (S.I. 1956 No. 518.) 5d.
Import Duties (Drawback) (No. 5) Order, 1956. (S.I. 1956 No. 526.)
Mid and South-East Cheshire Water Board Order, 1956. (S.I. 1956 No. 472.) 6d.
Newtown and Llanllwchaiarn Water Order, 1956. (S.I. 1956 No. 487.) 5d.
Norfolk and Suffolk Area (Conservation of Water) Order, 1956. (S.I. 1956 No. 473.)
Perth-Aberdeen-Inverness Trunk Road (Elgin By-pass) Order, 1956. (S.I. 1956 No. 517.)
Retention of Cables, Main and Pipes under Highways (Herefordshire) (No. 1) Order, 1956.
Retention of Cables and a Main under Highways (Nottinghamshire) (No. 2) Order, 1956. (S.I. 1956 No. 520.)
Retention of Cables, Mains and Pipe under Highways (East Riding of Yorkshire) (No. 1) Order, 1956. (S.I. 1956 No. 497.)
Rope, Twine and Net Wages Council (Great Britain) Wages Regulation(Amendment) Order, 1956. (S.I. 1956 No. 504.) 6d.
Safeguarding of Industries (Exemption) (No. 3) Order, 1956. (S.I. 1956 No. 486.)
Sea-fishing Industry (Fishing Nets) Order, 1956. (S.I. 1956 No. 531.) 5d.
Sheriffs' Fees (Amendment) Order, 1956. (S.I. 1956 No. 502 (L. 5).)
South Cardiganshire Water Board Order, 1956. (S.I. 1956 No. 527.) 11d.
Stopping up of Highways (Bedfordshire) (No. 3) Order, 1956. (S.I. 1956 No. 522.)
Stopping up of Highways (Bedfordshire) (No. 4) Order, 1956. (S.I. 1956 No. 475.)
Stopping up of Highways (Birmingham) (No. 2) Order, 1956. (S.I. 1956 No. 507.)
Stopping up of Highways (Bradford) (No. 1) Order, 1956. (S.I. 1956 No. 491.)
Stopping up of Highways (Bristol) (No. 3) Order, 1956. (S.I. 1956 No. 489.)
Stopping up of Highways (Derbyshire) (No. 2) Order, 1956. (S.I. 1956 No. 508.)
Stopping up of Highways (East Sussex) (No. 2) Order, 1956. (S.I. 1956 No. 509.)
Stopping up of Highways (Grimsby) (No. 1) Order, 1956. (S.I. 1956 No. 524.)
Stopping up of Highways (Kent) (No. 9) Order, 1956. (S.I. 1956 No. 492.)
Stopping up of Highways (Leeds) (No. 1) Order, 1956. (S.I. 1956 No. 525.)
Stopping up of Highways (London) (No. 10) Order, 1956. (S.I. 1956 No. 493.)
Stopping up of Highways (London) (No. 11) Order, 1956. (S.I. 1956 No. 510.)
Stopping up of Highways (London) (No. 12) Order, 1956. (S.I. 1956 No. 494.)
Stopping up of Highways (Portsmouth) (No. 2) Order, 1956. (S.I. 1956 No. 495.)
Stopping up of Highways (Stockport) (No. 1) Order, 1956. (S.I. 1956 No. 490.)
Stopping up of Highways (West Riding of Yorkshire) (No. 10) Order, 1956. (S.I. 1956 No. 512.)
Stopping up of Highways (West Riding of Yorkshire) (No. 11) Order, 1956. (S.I. 1956 No. 513.)
Stopping up of Highways (Worcestershire) (No. 6) Order, 1956. (S.I. 1956 No. 511.)
Supreme Court Fees (Amendment) Order, 1956. (S.I. 1956 No. 503 (L. 6).) See p. 268, *ante*.
Town and Country Planning (County of Durham) Development Order, 1956. (S.I. 1956 No. 529.) 6d.
Warwickshire and Coventry (Boundaries) Order, 1956. (S.I. 1956 No. 446.) 11d.
Wild Birds (Oyster-Catchers) (No. 2) Order, 1956. (S.I. 1956 No. 500.)
Winchester-Preston Trunk Road (East Ilsley By-pass) Order, 1956. (S.I. 1956 No. 521.)

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 21 Red Lion Street, London, W.C.1. The price in each case, unless otherwise stated, is 4d., post free.]

NOTES AND NEWS

Honours and Appointments

The James Willis Mills Prize, awarded to students in Hull and district, was awarded this year to Mr. R. J. A. IVESON, B.A.(Oxon), of Hull.

Mr. GORDON C. MIDDLETON, assistant solicitor to Eastbourne Corporation, has been appointed chief assistant solicitor to the County Borough of Birkenhead.

Mr. DAVID SKINNER, solicitor, of Derby, has been elected president of the Derby Junior Chamber of Commerce.

Miscellaneous

The President of The Law Society, Mr. W. CHARLES NORTON, gave a luncheon party on 9th April at 60 Carey Street, Lincoln's Inn. The guests were: the Norwegian Ambassador, the Lord Chief Justice, the chairman of Barclays Bank Ltd., the president of the Institute of Chartered Accountants, the permanent secretary to the Lord Chancellor, the secretary of the Building Societies Association, Sir Edwin Herbert, Mr. N. B. Sherwell and Mr. T. G. Lund.

THE SOLICITORS' LAW STATIONERY SOCIETY, LIMITED

In a preliminary announcement, dated 18th April, 1956, the Directors announce that the profit for the year 1955, after providing £61,708 (*£57,445*) for taxation, amounted to £103,910 (*£94,823*). A final dividend of 8 per cent. (*13 per cent.*), making 12 per cent. (equivalent to 18 per cent. paid in 1955 on capital of £200,000) for the year, is recommended, absorbing £20,700 net (*£20,450*). The gross bonus payable to the staff amounts to £38,000 (*same*). Rebuilding reserve receives £20,000 (*£10,000*), general reserve £7,500 (*same*), reserve against loss on purchase tax £5,000 (*£12,500*) and women's pension reserve £2,500 (*same*). Carry forward £56,436 (*£46,226*). Meeting: 15th May. Books closed: 2nd to 15th May inclusive.

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